No. 96853-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FIRESIDE BANK fka FIRESIDE THRIFT CO., a California corporation,

Plaintiffs/Respondents,

v.

JOHN W. ASKINS AND LISA D. ASKINS,

Defendants/Appellants

BRIEF OF AMICI STATEWIDE POVERTY ACTION NETWORK AND NORTHWEST CONSUMER LAW CENTER

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I. IDENTITY AND INTEREST OF AMICI

A. Statewide Poverty Action Network.

Statewide Poverty Action Network (Poverty Action) is Washington State's largest anti-poverty organization. Through community organizing and advocacy, Poverty Action works to develop public policy solutions that address the root causes of poverty and promote economic opportunity. Founded in 1996, by ten activists of color, Poverty Action is Washington's most diverse anti-poverty coalition. Poverty Action's work is therefore informed by a racial equity analysis.

Poverty Action recognizes that consumers fall into debt for a variety of reasons, including illness, job loss, or other life-changing situations. For people living on low incomes, debt is a significant barrier to escaping poverty. Due to longstanding disparities in wealth and income, families of color are less likely to have the means to handle unexpected expenses or a loss of income. And households of color are more likely to be burdened with overwhelming debt than white families.

Poverty Action believes everyone should have access to support and a baseline of economic stability, even in hard times. To that end, Poverty Action advocates for maintaining consumer protections already in place and developing stronger debt protections to protect Washington

consumers who, like John and Lisa Askins, face exploitative and unlawful debt collection practices.

Across the country, debt buyers buy up outstanding debts and then use state court systems to sue people who owe those debts. Debt collection companies buy these old debts for pennies on the dollar and without warranties to debt buyers like Appellant Cavalry Investments, LLC regarding the validity of the debt, interest, fees, and other charges are lawful and correct. As a result, debt buyers often unlawfully shift the burden to consumers to prove they do not owe the debt in the amount alleged. And that is precisely what would happen here if the decision of the Court of Appeals is not reversed.

Poverty Action believes the trial court properly construed the Washington Collection Agency Act (CAA) liberally in favor of consumers in accordance with its purpose. Cavalry collected or attempted to collect amounts in addition to principal that were greater than allowed by law in violation of the CAA. The trial court therefore properly stripped Cavalry's judgment to the principal amount of the underlying debt—an amount which had already been more than satisfied.

B. Northwest Consumer Law Center.

Northwest Consumer Law Center (NWCLC) is a statewide non-profit law firm serving low- and moderate-income Washington consumers. NWCLC is the only organization in Washington that focuses solely on consumer legal issues. Based in Seattle, NWCLC has represented and counseled consumers in 29 of Washington's 31 counties. Since opening its doors in 2013, NWCLC has represented hundreds of Washington consumers facing unfair debt collection practices.

Through its education and outreach programs, NWCLC empowers consumers by providing guidance on how to respond to debt collection lawsuits, education on the documentation issues frequently seen in debt buying cases, and advice on the laws that protect consumers from harassment. Through affirmative litigation, NWCLC assists clients in obtaining relief from debt collectors who use unfair collection tactics in violation of the Fair Debt Collection Practices Act and the Washington Collection Agency Act. NWCLC and its clients have a substantial interest in the development and fair application of Washington's consumer protection laws in collection lawsuits. NWCLC believes that the trial court's interpretation of the CAA promotes the purpose of the statute of protecting consumers from unfair and abusive debt collection practices.

II. ISSUE ADDRESSED BY AMICI

This amicus brief addresses the broader legal and policy issues involving the debt buying industry and the effect these practices have on consumers like John and Lisa Askins.

III. STATEMENT OF THE CASE

Amici adopt and incorporate by reference the Statement of the Case of Respondents in their Petition for Review at 2-7.

IV. ANALYSIS

A. Problems in the debt buying industry result in unlawful collection practices that negatively impact Washington consumers.

The most significant change in the debt collection industry in the last two decades is the advent and growth of debt buying. *See* Jake Halpern, *Bad Paper: Chasing Debt from Wall Street to the Underworld* (Farrar, Straus and Giroux, New York: 2014). In a report on the debt buying industry, the Federal Trade Commission explained that debt buyers purchase charged-off or other delinquent consumer debt portfolios for pennies on the dollar from creditors or prior assignees of the debt. Federal Trade Commission, *The Structure and Practice of the Debt Buying Industry* (2013) at 23 (hereinafter, FTC Debt Buyer Report), *available at* http://www.ftc.gov/reports/structure-practices-debt-buying-industry. Indeed, the average price paid for purchased consumer debt

was 4 cents per dollar of face value, with older debt selling for a lower price. *Id*. at 23.

The accounts are sold "as is," often repeatedly from debt buyer to debt buyer, pursuant to contracts called "forward flow agreements" in which the seller states that the debts may not be owed or not in the amount stated, and the essential documentation may be missing. *See* Peter Holland, *Debt Buyer Lawsuits and Inaccurate Data*, Communities & Banking (Spring 2014) at 1. Selling an account "as-is" often translates into unreliable records being used to collect on debts or to enforce judgments for those debts already reduced to judgment. According to the FTC, "both sellers and buyers kn[o]w that some accounts included within a portfolio might have incomplete or inaccurate data, including data on important information such as the then-current balances on debts." FTC Debt Buyer Report at C-7–C-8. "Most significantly, debt buyers often did not receive the information needed to break down outstanding balances on accounts into principal, interest, and fees." *Id*. at 36.

Consumer debts are usually sold without any warranties whatsoever. *See* FTC Debt Buyer Report at iii, 24-28 (finding that "sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about

individual debts"); *see also* Dalie Jimenez, *Dirty Debts Sold Dirt Cheap,* 52 Harvard J. on Legislation 41 (Winter 2015) (independent study of 84 purchase and sale agreements for consumer debts finding that "in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred"). As Professor Dalie Jimenez, a leading expert on the debt buying industry, has explained, when a debt is conveyed in the commercial context, the purchase and sale agreement includes warranties from the seller and is not akin to a quitclaim deed where a property interest is conveyed without warranties. *Id.* at 45. While it makes sense that "a rational buyer at a minimum would want the seller to warrant that (1) it has title to the accounts it is selling, (2) it has complied with applicable consumer protection laws, and that (3) the information it is acquiring about the debt and the debtor is accurate[,]" this is not the practice in the debt buying industry. *Id*. at 45-46. Instead, the purchase and sale agreements include "'reliance waivers,' a declaration from the buyer that it has not relied on any statements or representations the seller may have made at any point." *Id*. at 47. Certain "material aspects of the transaction" are disclaimed, including "compliance with applicable laws" and "that the amounts listed as owed by the account holders are correct." *Id*.

Information on the debts sold is usually transmitted in large spreadsheets, which is problematic when substituted for original account-level documentation and court records. Creditors (and collectors) make mistakes when transferring information from the original documentation to spreadsheets. *See, e.g., Chase Bank, USA NA. and Chase Bankcard Services, Inc.*, No. 2015-CFPB-0013 (Consumer Fin. Prot. Bureau July 8, 2015) (Consent Order) ¶¶ 24-27 (listing examples), *available at* https://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf. A spreadsheet is unlikely to include an itemization of the debt that distinguishes between principal, interest, and the various fees and charges that have accumulated over time, both pre- and post-judgment. And, if debt buyers receive only spreadsheets conveying basic information about the debt, and a detailed history of payments and garnishments is missing, the debt buyers also will not have documents in hand that are necessary to accurately respond to questions or disputes, and may resort to guesses or estimates, and, as is the case here, attempt to shift the burden of proof to the consumer.

While most debts sold have not yet been reduced to judgment, debt buyers do purchase "judgment accounts" like the Askins' account,

which result from an unpaid legal judgment. FTC Debt Buyer Report at D-9; *see also* Jimenez, *Dirty Debts Sold Dirt Cheap,* at 54 (discussing debt buyer industry practices and noting that debt may be sold "even after a judgment has been entered against a consumer"). Judgment accounts are attractive to debt buyers because the amount the court awards to the creditor replaces the original debt and "creates a new debt obligation that, typically, commences a new statute of limitations period and may also permit additional collection methods (e.g., garnishment of wages or bank accounts or liens against real property) that may not have been available prior to the judgment." FTC Debt Buyer Report at D-9.

As Human Rights Watch explained, "[t]he debt buying industry's business model is rooted in a very simple logic. If debt buyers can acquire debts cheaply enough, and develop efficient, low-cost methods of pursuing debtors, they can realize substantial profits by collecting even a small percentage on the debts they purchase." Human Rights Watch, "Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor" (2016) at 11, *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor.

Research has shown that debt buyers often abuse these legal channels and attempt to "collect debts they knew, or should have known, were inaccurate or could not legally be enforced." Center for Responsible Lending, "Debt By Default: Debt Collection Practices in Washington 2012-2016" (March 2019) at 1-3, fn.9, available at https://www.responsiblelending.org/media/new-report-debt-buyers-go-largely-unchallenged-lawsuits-against-washington-state-consumers-and (quoting *CFPB Takes Action Against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts*, Consumer Financial Protection Bureau (Sept. 2015), *available at* https://www.consumerfinance.gov/about-us/newsroom/ cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/).

1. Debt collection abuses rank second in complaints filed by Washington State consumers.

In Washington, debt collection abuses rank first in the type of complaints filed by Washington State military servicemembers to the Consumer Financial Protection Bureau, and second for all consumers in the state. *See* Center for Responsible Lending, "Debt By Default: Debt Collection Practices in Washington 2012-2016" at 5-6. A recent report by the Center for Responsible Learning that examines debt collection

practices in Washington found that more than 80 percent of lawsuits filed by debt buyers against consumers are unchallenged in court. *Id*. So people sued by debt buyers are frequently subject to a judgment or garnishment of their wages without the debt buyer ever proving their case or the validity of the debt.

2. Cavalry's enforcement of the judgment against the Askins without proof of the amounts actually and lawfully owed is standard practice in the debt buying industry.

The trickle-down effect on consumers of these debt buying practices is exemplified by the Askins' case. Fireside Bank filed a lawsuit in July 2007 to collect an auto repossession and sale deficiency, and three months later, obtained a default judgment against the Askins. CP 10-14. The default judgment included $7,754.39 in principal, plus $1,782.93 in prejudgment interest, $368 in attorney's fees, and $275 in costs, for a total of $10,180.32. *Id*. This amount was in addition to the $10,053.00 the Askins had already paid Fireside over the life of the loan, before they surrendered the vehicle. *Id*.

During the next five years, Fireside recovered funds from the Askins on 12 writs of garnishment, in the amount of $10,849.16. *See* Respondents' Pet. for Review at 4, fn.1 (detailing garnishments). Cavalry purchased the judgment in September 2012 and obtained a garnishment

judgment and order to pay based on a writ of judgment previously issued to Fireside; thereafter, Cavalry filed five additional declarations for writs of garnishment. CP 297-364.

By November 2015, the Askins had paid approximately $22,102.38 for the voluntarily returned car they had originally purchased for $14,813.44. CP 313-314, 337-338, 359-363. Yet Cavalry claimed in its garnishment papers that more than $10,722.48 was still owed on the judgment, including amounts for "garnishment attorney fee" which had not been awarded. *Id*.

What happened next is all-too typical of the problems that arise when debts are bought and sold in bulk with no warranties and limited backup information. After the Askins retained Northwest Justice Project to represent them and disputed the amount allegedly owed, Cavalry's counsel provided what he described as "an Amortization of the account from the date of the judgment until it was assigned to our client and transferred to our office." CP 422. After the Askins filed their motion for order to show cause why a full satisfaction of judgment should not be entered, Cavalry provided three more inconsistent and conflicting "amortizations." *See* CP 372, 408-409, 412, 445, 450-457. Cavalry therefore admitted in its trial court briefing that the initial amortization

"mistakenly included costs and fees that should not have been included as they were not awarded by the Court." CP 430. Yet, Cavalry had sought those unlawful costs and fees in garnishments. *Id*.

The trial court recognized that Cavalry's later attempts to, in its own words, "cure[] this defect" by submitting the subsequent amortizations, were nothing more than eleventh-hour efforts to eliminate unauthorized costs and avoid liability. *See* CP 462-63 (Order Denying Motion for Reconsideration; finding that Cavalry "submits a new 'accounting' wherein it attempts to back out the unauthorized costs in order to cure the various violations of RCW 19.16.250(21)"). Cavalry's attempts to "do the math" and reverse-engineer the (apparently limited) records it had purchased with the Askins' judgment, reconcile the same with the garnishment papers, and do so in a way that resulted in an amount due that did not include unlawful costs, were, and are, troubling. Moreover, such efforts cannot cure Cavalry's earlier attempts to collect amounts that included unlawful costs in violation of RCW 19.16.250(21).

3. Unlawful collection practices undermine consumers' economic security.

The unfair and unlawful debt collection practices that arise out of debt buyers' customary practices can have a devastating effect on low income people like John and Lisa Askins. As one recent report explained,

millions of Americans "live with the possibility that, at any moment, their wages or the cash in their bank accounts could be seized over an old debt." Paul Kiel, "So Sue Them: What We've Learned About The Debt Collection Lawsuit Machine," *ProPublica*, May 5, 2016, *available at* https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine.

Every dollar paid to a debt buyer that may or may not be owed impairs consumers' ability to pay legitimate creditors for rent and health insurance premiums, keep families out of bankruptcy and preserve assets for ensuring family and community stability. In many states, including Washington (which is one of the least protective states in the country with regard to the amount of earned income protected from garnishment), judgments are valid for 10 years and renewable for up to another 10 years. *See* RCW 6.17.020(1) (providing that judgments may be enforced within ten years of entry); RCW 6.17.030 (court can grant additional ten years during which judgment can be enforced). The ability to enforce a judgment for up to 20 years prevents consumers and their families from being able to make ends meet or to get a fresh start. When families are living paycheck to paycheck – assuming there is a wage earner in the household – their income goes to necessities like rent, food,

and utility payments. *See, e.g.,* Paul Kiel & Annie Waldman, "The Color of Debt: How Collection Suits Squeeze Black Neighborhoods," ProPublica (Oct. 8, 2015), *available at* https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods. "A garnishment hits this kind of household budget like a bomb." *Id*. Thus, the radiating harms from a debt buyer lawsuit can be devastating on a low-income family's housing and economic stability long after the judgment is entered.

The harsh consequences of this broken system fall disproportionately on people and communities of color. *See, e.g.,* Kiel & Waldman, "The Color of Debt"; *see also* Susan Shin & Claudia Wilner, New Economy Project, "The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality" (2013) at 5, *available at* https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf (finding that zip codes with highest rate of default judgments in debt collection cases were predominantly in non-white communities); Human Rights Watch, "Rubber Stamp Justice" at 22 (explaining that debt collection lawsuits "seem to fall disproportionately on minority communities").

Because of the devastating financial impact debt buyers' actions can have on people struggling to make ends meet, there is a compelling

interest in ensuring that debt buyers, and indeed, all debt collectors, act in accordance with the law and that justice is done. It is incumbent on the courts to ensure that debt buyers are not able to enforce judgments against consumers using unfair and unlawful methods that include adding fees and interest in amounts not permitted by law. Turning a blind eye to those practices, or excusing their consequences as "no harm, no foul" math errors, only exacerbates the problem.

B. Shifting the burden to consumers to prove they do not owe a debt or to prove the amount properly owed is contrary to the Collection Agency Act and contract law.

Washington courts "construe consumer protection statutes ... liberally in favor of the consumers they aim to protect." *Jametsky v. Olsen*, 179 Wn.2d 756, 765, 317 P.3d 1003 (2014) (requiring liberal construction of the Distressed Property Conveyances Act, RCW chapter 61.34); *see also Carlsen v. Global Client Solutions*, 171 Wn.2d 486, 498, 256 P.3d 321 (2011) (explaining that "as a remedial statute enacted to stem the 'numerous unfair and deceptive practices' rife in the growing debt adjustment industry, the debt adjusting statute should be construed liberally in favor of the consumers it aims to protect").

The Collection Agency Act, chapter 19.16 RCW is no exception. The remedial purpose of the CAA permeates the statute. Violations of the

CAA's "prohibited practices" section, RCW 19 .16.250, are per se "unfair and deceptive acts in the conduct of trade or commerce" for purposes of the Consumer Protection Act, chapter 19 .86 RCW (CPA). *See* RCW 19.16.440. As a result, all CPA remedies are available to consumers alleging CAA violations, including exemplary damages and attorneys' fees. *See* RCW 19.86.090. But the CAA itself provides a penalty when debt collectors engage in statutorily prohibited practices: stripping the debt to principal. *See* RCW 19.16.450. This Court has confirmed that "[t]he business of debt collection affects the public interest" and explained that "collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009).

For these reasons, this Court should strictly construe the CAA's prohibition on collecting amounts in addition to principal unless those amounts are "allowable interest, collection costs or handling fees expressly authorized by statute, or, in the case of suit, attorney's fees and taxable court costs],]" *see* RCW 19.16.250(21). There is nothing in the CAA providing that all amounts added to the principal are presumed lawful until challenged by the alleged debtor. The effect of reversing the trial court's order and agreeing with Cavalry that the Askins did not meet

"their" burden of proof, is to allow debt collectors to demand information or documentation from consumers, or otherwise shift the burden to consumers to disprove that they owe the alleged debt and whether interest, fees, and other charges added to the principal over time are in fact lawful and correct.

Shifting the burden to consumers to show they do not owe the debt, or do not owe a debt in the alleged amount, would also fly in the face of black letter contract law. Generally, a plaintiff alleging breach of contract "must establish the existence of a valid and enforceable contract, the rights of the plaintiff and obligations of the defendants under the contract, violation of the contract by the defendant, and damages to the plaintiff." *Citoli v. City of Seattle*, 115 Wn. App. 459, 476, 61 P.3d 1165 (2002). In short, debt collectors, including debt buyers, must meet the same burden of proof that applies to any other party seeking to recover an amount allegedly owed.

In a breach of contract lawsuit between two corporations that results in a judgment for the plaintiff, the plaintiff-corporation cannot add interest and fees to the judgment over time without proof that the interest and fees are both lawful and accurate. A debt buyer like Cavalry must adhere to the same standards of proof when it seeks to enforce a

judgment in a consumer collection case. Indeed, given the established problems with the integrity of the account information that debt buyers purchase, coupled with the imbalance of power between debt buyers and struggling consumers, debt buyer litigants are the last type of litigant who should enjoy the benefits of shifting the burden to consumers to prove that the debt is valid and the amount sought is correct and authorized by law.

Here, just as it would in a commercial dispute, Cavalry failed to meet its burden to show that the amounts it sought to collect were authorized by law and instead offered a series of inconsistent accountings that proved the opposite. Because Cavalry sought to collect amounts that were not authorized by law, the trial court properly found that Cavalry had violated the CAA.

V. CONCLUSION

For struggling Washington households, abusive debt collection and judgment enforcement tactics simply compound the harms caused by insufficient income, unexpected financial emergencies, or predatory lending. The cumulative impacts of these practices are real, and vulnerable communities are more likely to be affected by these abuses. To that end, confirming the broad and remedial scope of the Collection

Agency Act, Chapter 19.16 RCW, and affirming the trial court's decision stripping the Askins' debt to principal will send a strong message to debt buyers that engaging in the type of practices that affected the Askins will not be tolerated. Poverty Action and NWCLC respectfully request this Court reverse the Court of Appeals and affirm the trial court's orders finding that Cavalry violated the RCW 19.16.250(21) by collecting or attempting to collect amounts to which it was not entitled and holding that the debt should be stripped to principal, pursuant to RCW 19.16.450.

RESPECTFULLY SUBMITTED AND DATED this 6th day of September, 2019.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of September, 2019.

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